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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/801,353	03/07/2001	Steven Schwartz	BROOKSTONE 00.04	4898

7590  
Norman P. Soloway  
Hayes, Soloway  
175 Canal Street  
Manchester, NH 03101

02/11/2004

EXAMINER

THANH, QUANG D

ART UNIT	PAPER NUMBER
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3764

DATE MAILED: 02/11/2004

17

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/801,353

Applicant(s)

SCHWARTZ ET AL.

Examiner

Quang D. Thanh

Art Unit

3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 26 September 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-14 and 16-51 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-14, 16-51 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### DETAILED ACTION

1. This office action is responsive to the amendment filed on 1/27/03. As directed by the amendment, claims 1-14, 16-27, 32,33,40, and 49-53 were amended; no claim was added nor canceled. Thus, claims 1-14 and 16-51 are presently pending in this application.

### ***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1-4, 9-12, 14, 16-20, 27-33, 37, 39, 40, 47, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson (5,895,365) in view of Rosado (5,503,457).

Regarding claims 1 and 27, Tomlinson teaches a bedrest cushion 10 comprising: a back portion 12 and a padded interior (column 4, lines 4-7), a plurality of vibrating transducers 20 (massage motors), a pair of padded (with vinyl covering, col. 4, lines 39-41) armrests coupled to the back portion, and a light source 54 supported by an arm (figure 5), wherein the back portion and the armrests have lower surfaces for resting on the upper surface of the bed (fig. 1, col. 4, lines 9-11).

Tomlinson's arm is being attached to an armrest 28 rather than being attached to the back portion. However, Rosado teaches a light source 47' being mounted to a back

portion of a chair by an arm 46. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to rearrange the location of Tomlinson's light source as being mounted to the back portion as taught by Rosado, since the location is a matter of design for art recognized equivalent and doing so would place the light in an optimum position that does not interfere with the user's movements and yet still provide good lighting for reading if desired.

Regarding claims 2-3 and 31, the modified Tomlinson/Rosado reference lacks a detail description that the arm is flexible. However, the feature of having a flexible arm carrying a light source, i.e., a gooseneck lamp, is notoriously old and well known in the art. Thus, the feature of having a flexible arm fails to patentably define over the prior art.

Regarding claims 4 and 32, since Tomlinson already teaches a light attached to the cushion, and that the cushion is preferably constructed of dense urethane foam (col. 4, lines 11-13) and the vibrators are disposed within the padded interior of the cushion (col. 4, lines 14-15), it would inherently comprehend the limitation of "the cushion has a mass and is formed of material which provide vibration attenuation and isolation to protect filaments in the light source".

Regarding claims 9 and 33, Tomlinson shows a cup holder 26.

Regarding claims 10-12 and 37, Tomlinson in column 4, lines 29-32 discloses that the vibrating transducers 20 (massage motors) are disposed within the padded interior of the back portion between the forward and rearward surfaces (figs. 3-4) and

being connected to the control panel 32, which has a control knob 34 for altering the on/off setting (figure 2, col. 4, lines 30-33).

Regarding claims 14, 16, 28 and 30, Tomlinson in Fig. 2 (OFF and multiple settings of 1,2,3) discloses that the vibrating transducers 20 comprise pulsating transducer, which are vibrating massage motors.

Regarding claims 17 and 29, Tomlinson does not explicitly disclose that the massage motors comprise percussive vibrator or roller massage motors. The feature of choosing different type massaging motors is considered as an obvious design choice since such massaging motors are well known in the massaging art.

Regarding claims 18 and 39, Rosado has a housing 45 for mounting the arm to the back portion but lacks detail description that the housing is removable. The feature of choosing a removable lamp support housing for coupling the arm to the back portion is considered as an obvious design choice since the removable lamp support housing is well known in the art. Moreover, it appears that the removable housing is not a criticality and the modified Tomlinson's device would perform equally well with the removable housing.

Regarding claim 19, the feature of choosing a battery power supply rather than AC power supply is considered as an obvious design choice, since the battery power supply is well known in the art.

Regarding claims 20 and 40, figure 3 of Tomlinson shows that the back portion is angularly adjustable relative to the armrest.

Regarding claims 47 and 48, the feature of choosing a hand-held control panel (or a remote controller) is considered as an obvious design choice since the remote controller is well known in the massage art.

4. Claims 5, 7, 8, 34, 36, 38, and 51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson in view of Rosado as applied to claims 1 and 27 above, and further in view of Schwaegerle (5,696,574).

As in claims 5, 34 and 51, Tomlinson in column 4, lines 57-60 and 30-32 discloses the light source 54 including an electrical cord 56 adapted for coupling with the electrical outlet 36 of the control panel 32. Tomlinson lacks a detail description that the control panel having a switch for altering the on/off status of the light source. However, Schwaegerle teaches a control panel 340 having on/off switch 370 for the lamp 24 (figure 14 and column 10, lines 28-35). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide Tomlinson's control panel with an on/off switch for controlling the lamp as taught by Schwaegerle, since the on/off switch is necessary and common practice in the light source art.

As in claims 7 and 36, the feature of having the electrical wire, which connecting the light source to the control panel, being enclosed within the interior of the cushion is considered as an obvious design choice within the knowledge of one skill in the art, so as to improve the appearance of the cushion.

As in claims 8 and 38, Schwaegerle in column 10 lines 28-35 teaches the actuator 372 for adjusting the intensity of the light source 24.

5. Claims 6 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson in view of Rosado and Schwaegerle as applied in claims 5 and 34 above, and further in view of Stottmann (5,453,586).

The modified Tomlinson's control panel lacks a flexible membrane. However, Stottmann teaches a flexible membrane 40 for covering a control panel. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the modified Tomlinson's control panel with a flexible cover as taught by Stottmann, so as to enhance the cleanability for protecting the switches against fluid and dust contamination.

6. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson in view of Rosado as applied in claim 10 above, and further in view of Liang (5,429,585).

Tomlinson teaches motors being incorporated within a cushion. Tomlinson lacks motors being located within a separated pillow such that the pillow is detachable from the cushion. However, Liang teaches a massaging pillow being detachably attached to a chair for providing massaging function. If one of ordinary skill in the art desired to have removable vibrating motors, one would have looked to Tomlinson's device and seen that Tomlinson's cushion would be able to perform equally well if the massaging

motors being detachably attached to the back support of the cushion in view of Liang's teaching.

7. Claim 21-23 and 41-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson in view of Rosado as applied in claims 1 and 27 above, and further in view of Gera (5,335,962).

Tomlinson's cushion lacks a telephone. However, Gera teaches (figure 4) a chair having a telephone which including a base station and a handset (speaker). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide Tomlinson's cushion with a telephone as taught by Gera, so as to provide convenience to the user.

8. Claims 24, 25, 44, 45, 49, and 50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson in view of Rosado as applied in claims 1 and 27 above, and further in view of Foster, Jr. et al (5,020,517).

The modified Tomlinson's cushion lacks a bladder and heat source. However, Foster teaches a massaging cushion including a bladder 22 and heat source 72. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide Tomlinson's cushion with a bladder and heat source as taught by Foster, in order to enhance the massage effect.



9. Claims 26 and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson/Rosado as applied in claims 1 and 27 above, in view of Prosser (5,838,808).

10. The modified Tomlinson/Rosado's device lacks a transmitter attached to the arm. However, Prosser teaches a chair having a transmitter 52 being electrically connected to a remote control 50 for effectively communicating with a conventional television (column 3, line 63 to column 4, line 1). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide Tomlinson's cushion with a transmitter connected to a TV remote control as taught by Prosser, in order to provide convenience to the user. Notes that the feature of having the transmitter attaching to the a particular location, i.e., the arm is considered as an obvious design choice within the knowledge of one skill in the art, since it appears that the modified Tomlinson's cushion would perform equally well with the transmitter attached to the arm.

11. Claims 26 and 46 are also rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson/Rosado as applied in claims 1 and 27 above in view of Guenther (5,613,222).

The modified Tomlinson's device lacks a transmitter attached to the arm. However, Guenther teaches a transmitter 23 for picking up sounds made by a person for transmitting such sounds to the transmitter of the telephone. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide Tomlinson's cushion with a transmitter as taught by Guenther, in order to pick

up sounds made by the person who sits on the cushion. Notes that the feature of having the transmitter attaching to the a particular location, i.e., the arm is considered as an obvious design choice within the knowledge of one skill in the art, since it appears that the modified Tomlinson's cushion would perform equally well with the transmitter attached to the arm.

### ***Response to Arguments***

1. Applicant's arguments with respect to claims 1-14 and 16-51 have been fully considered but they are not persuasive.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Regarding applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.

See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Tomlinson already teaches a light mounted to an arm connected to the armrest of the cushion and the only difference between Tomlinson and the claimed invention is the location where the light is mounted. Rosado is cited to merely teach that the light source can be mounted to the back portion of a seat cushion and doing so would place the light in an optimum position that does not interfere with the user's movements and yet still provide good lighting for reading if desired.

2. In response to applicant's argument that Schwaegerle is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Tomlinson already teaches a light and a control panel but is silent regarding a light switch and therefore Schwaegerle is cited to teach the provision of a control panel with an on/off switch for controlling the lamp, since the on/off switch is necessary and common practice in the light source art.

In response to applicant's argument that Stottmann is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this

case, Tomlinson already teaches a light and a control switch but is silent regarding a flexible membrane to cover the switch and therefore Stottmann is cited to teach the provision a flexible cover over the control panel, such that it would enhance the cleanability for protecting the switches during use against fluid and dust contamination.

3. In response to applicant's arguments against the references individually including Liang, Gera, Foster, Prosser, and Guenther, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Each of these reference is reasonably pertinent to the particular problem or feature with which the applicant was concerned, and therefore is considered to be prior art that can be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). Each of these reference teaches the claimed feature that was missing from the primary reference, and applicant's claimed feature is exemplified and shown by the reference (see corresponding rejections above) that it is old and well known in the art; and given the teaching it would be obvious for one skill in the art to modify the primary reference as taught or suggested by the teaching to achieve the claimed invention.

### **Conclusion**

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Quang D. Thanh whose telephone number is (703) 605-4354. The examiner can normally be reached on Monday-Thursday & alternate Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nick Lucchesi can be reached on (703) 308-2698. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-1148.

Quang D. Thanh  
Patent Examiner  
Art Unit 3764  
February 6, 2004



NICHOLAS D. LUCCHESI  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3700